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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214730
Party	Defendant Natreon, Inc.
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Date	04/28/2014
Attachments	Motion_to_Set_Aside_Notice_of_Default.PDF(98529 bytes) Answer.PDF(137806 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Abbott Laboratories,		
Opposer,		
vs.		Opposition No..: 91214730
		Application No.: 85/886,054
Natreon, Inc.,		
Applicant.		

To: United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

MOTION TO SET ASIDE NOTICE OF DEFAULT

Applicant, Natreon, Inc., hereby files this Motion to Set Aside Notice of Default.

PROCEDURAL HISTORY

On January 30, 2014, Opposer served a copy of its Notice of Opposition upon Applicant and Applicant's outside trademark counsel. The Trademark Trial and Appeal Board's Notice regarding that filing was also mailed on January 30, 2014. As a result, Applicant's Answer was due March 11, 2014. Because Applicant failed to file an Answer by the March 11, 2014 deadline, the Trademark Trial and Appeal Board issued a Notice of Default on March 28, 2014. Applicant now moves set aside Default in this Opposition proceeding.

LEGAL ARGUMENT

It is well settled that if a defendant who has failed to file a timely answer to a Notice of Opposition responds to a Notice of Default by filing a satisfactory showing of good cause why default judgment should not be entered against it, the Trademark Trial and Appeal Board (hereinafter "the TTAB" or "the Board") should set aside the Notice of Default. T.B.M.P. §312.02; *See also* Fed. R. Civ. P. 55(c).

The showing which has consistently been required by the Board and the courts in order to permit the late filing of an answer is set forth in Rule 55(c) of the Federal Rules of Civil Procedure, namely, demonstrating good cause for why an Answer had not been filed. *See Fred Hayman Beverly Hills, Inc., v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991).

Good cause is found to have been established if (1) the delay in the filing is not the result of willful conduct or gross neglect on the part of the defendant; (2) if the delay will not result in substantial prejudice to the plaintiff; and (3) if the defendant has a meritorious defense to the action. *Fred Hayman Beverly Hills, Inc.,* 21 USPQ2d at 1557; *See also* TBMP §312.02.

In the present case, the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant. The defendant, Applicant Natreon, Inc. timely provided instructions to answer the Notice of Opposition. Unfortunately, for the first time in the undersigned's more than seventeen (17) years of practice, the docket department of Applicant's trademark counsel failed to docket the deadline to file Applicant's Answer. As a result, Applicant's Answer was not timely filed. As stated in *Paolo's Associates Ltd. Partnership v.*

Bodo, "... where it is the attorney rather than the party itself that is responsible for the failure to properly defend an action, as is true of the instant case, courts are likely to vacate default." *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'n. 1990). Clearly, the delay in filing an Answer was not the result of willful conduct or gross neglect on the part of Applicant and, as was decided in *Paolo's Associates Ltd. Partnership v. Bodo*, Applicant should not be punished because its counsel failed to properly docket the deadline for filing the Answer.

Allowing Applicant to Answer the Notice of Opposition does not substantially prejudice Opposer. Applicant notes that Opposer has not filed any motions, nor has Opposer served any Initial Disclosures or discovery requests. Moreover, Applicant's counsel has already discussed the instant Opposition and possible settlement thereof with Opposer (prior to Opposer retraining outside counsel). Therefore, if the parties are unable to resolve the matter amicably, Opposer may proceed with developing its case, and if necessary, Applicant consents to resetting discovery and trial dates so that the parties have sufficient time to complete discovery and move forward into the testimony period. As a result, at this very early stage of the Opposition proceeding, Opposer will not be substantially prejudiced by the delay in filing the Answer.

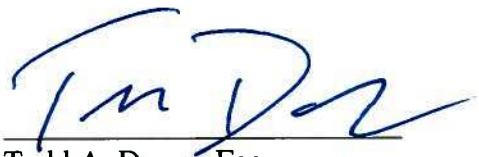
Finally, Applicant has a meritorious defense to the Notice of Opposition. It is Applicant's assertion that there would be no likelihood of confusion between the trademarks at issue. In support of the argument that Applicant has a meritorious defense, Applicant relies upon the attached Answer it wishes to file with the Board in reply to the Notice of Opposition. It is recognized that submission of a non-frivolous Answer adequately shows that an Applicant has a meritorious defense. *Fred Hayman Beverly Hills, Inc.,* 21 USPQ2d at 1557.

CONCLUSION

For the reasons set forth above, Applicant asserts that it has established good cause why Default should not be entered against Applicant for failure to file a timely Answer. In considering this matter, Applicant respectfully reminds the Board that it is the policy of the Board and the Federal Courts to decide cases on their merits and not by default. TBMP §312.02. *See also CTRL Systems Inc. v. Ultraphonics of North Amwerica Inc.*, 52 USPQ2d 1300 (TTAB 1999). Furthermore, any doubt that the Board may have should be resolved in favor of Applicant. TBMP §312.02. Therefore, Applicant respectfully requests that the Board not enter default, and order that the attached Answer be filed with the Board, and that parties proceed with the discovery conference and the discovery period in this matter.

Respectfully Submitted,

Natreon, Inc.

BY: 

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Attorney for Applicant

CERTIFICATE OF FILING

I hereby certify that this Motion to Set Aside Notice of Default is being filed with the United States Patent and Trademark Office via the Trademark Trial and Appeal Board's Electronic System for Trademark Trials and Appeals [ESTTA] on-line filing process.

4/28/2014		4/28/2014
(Date of Deposit)	(Signature)	(Date of Signature)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Motion to Set Aside Notice of Default was served, this 28th day of April 2014, via First Class Mail, Postage Prepaid, addressed as follows:

THOMAS M WILLIAMS
ULMER & BERNE LLP
500 W MADISON ST, STE 3600
CHICAGO, IL 61661-4587

Dated: 4/28/2014

BY: _____

Todd A. Denys, Esq.
PORZIO, BROMBERG & NEWMAN, P.C.
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Attorney for Applicant

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Abbott Laboratories,		
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To: United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

ANSWER TO NOTICE OF OPPOSITION

Dear Sir:

IN THE MATTER OF, United States Trademark Application No. 85/886,054 for the mark NU-VIGOR (hereinafter "the '054 Application"), Natreon, Inc., a corporation of the State of New Jersey with an address of 2-D Janine Place, New Brunswick, New Jersey 08901, owner of the '054 Application as shown in the records of the United States Patent and Trademark Office (hereinafter "Applicant") by way of Answer to Notice of Opposition filed by Abbott Laboratories (hereinafter "Opposer"), hereby states as follows:

Applicant admits that the records of the Trademark Trial and Appeal Board reflect that Opposer has obtained the necessary extensions of time to file the Notice of Opposition and that the Notice of Opposition was timely filed. Applicant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in the preamble to Opposer's Notice of Opposition, and therefore denies same, leaving Opposer to its proofs.

1. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in paragraph number 1, and therefore denies same, leaving Opposer to its proofs.

2. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in paragraph number 2, and therefore denies same, leaving Opposer to its proofs.

3. Applicant admits that the records of the United States Patent and Trademark Office identify Opposer as the owner of United States Trademark Application No. 85/592,253 for the alleged mark NUTRIVIGOR.

4. Applicant admits the allegations set forth in paragraph number 4.

5. Applicant admits the allegations set forth in paragraph number 5.

6. Applicant admits the allegations set forth in paragraph number 6.

7. Applicant admits that the '054 Application lists July 15, 2012 as the date of first use of the mark NU-VIGOR.

8. Applicant admits that the records of the United States Patent and Trademark Office indicate that Opposer filed United States Trademark Application No. 85/592,253 before Applicant's claimed date of first use in the '595 Application and before Applicant filed the '595 Application.

9. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in paragraph number 9, and therefore denies same, leaving Opposer to its proofs.

10. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in paragraph number 10, and therefore denies same, leaving Opposer to its proofs.

11. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in paragraph number 11, and therefore denies same, leaving Opposer to its proofs.

12. Applicant denies the allegations set forth in paragraph number 12.

13. Applicant admits that if it is granted registration of its NU-VIGOR trademark, that it will obtain all rights conferred under the Principal Register of the Trademark Act. Applicant further admits that registration of its NU-VIGOR trademark will operate as *prima facie* evidence of its right to use that trademark. Applicant denies that there is any likelihood of confusion with Opposer's trademark. Applicant further denies that registration of its NU-VIGOR trademark will give it any unlawful advantage and that it is not entitled to registration of its NU-VIGOR trademark under the Trademark Act. Applicant further denies the remaining allegations set forth in paragraph number 13.

AFFIRMATIVE DEFENSES

1. Opposer lacks standing to maintain this Opposition proceeding.

2. Applicant's mark and the mark cited by Opposer in the Notice of Opposition are visually and aurally different and present different commercial impressions such that there could be no likelihood of confusion as to the source of origin or sponsorship of the goods offered under the respective marks.

3. Upon information and belief, Applicant's goods and Opposer's goods are different such that there could be no likelihood of confusion as to the source of origin or sponsorship of the goods offered under the respective marks.

4. Upon information and belief, the goods to which the parties trademarks are applied or are to be applied are marketed through entirely different channels of trade such that that there could be no likelihood of consumer confusion between the marks.

5. Upon information and belief, the goods to which the parties trademarks are applied or are to be applied are marketed to different classes of consumers such that that there could be no likelihood of consumer confusion between the marks.

6. Applicant asserts that there would be no likelihood of confusion in connection with its use of the mark NU-VIGOR in connection with the goods listed in the '054 Application. To the extent that there could possibly be a likelihood of confusion in connection with the goods listed in the '054 Application, Applicant, in the alternative to registering its mark for the goods listed in the '054 Application, will then seek to limit the goods covered by the '054 Application to read:

> herbal extracts sold in bulk powder form for use in the manufacture of dietary and nutritional supplements; nutraceuticals sold in bulk powder form for use in the manufacture of dietary and nutritional supplements

WHEREFORE, Applicant respectfully requests that the Notice of Opposition to United States Trademark Application No. 85/886,054 for the mark NU-VIGOR be dismissed with prejudice, and that this application be allowed for registration.

Respectfully Submitted,

Natreon, Inc.

BY: _____

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E-mail: tadenys@pbnlaw.com
Attorney for Applicant

CERTIFICATE OF FILING

I hereby certify that this Answer to Notice of Opposition (with Affirmative Defenses) is being filed with the United States Patent and Trademark Office via the Trademark Trial and Appeal Board's Electronic System for Trademark Trials and Appeals [ESTTA] on-line filing process.

4/28/2014		4/28/2014
(Date of Deposit)	(Signature)	(Date of Signature)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Answer to Notice of Opposition (with Affirmative Defenses) was served, this 28th day of April, 2014, via First Class Mail, Postage Prepaid, addressed as follows:

THOMAS M WILLIAMS
ULMER & BERNE LLP
500 W MADISON ST, STE 3600
CHICAGO, IL 61661-4587

Dated: 4/28/2014

BY: _____

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